Brown Company; Brown Company, Livingston-Graham Division; Brown Company, Tri-City Concrete Division; L-T Transport, Inc. and successors with liability Gulf & Western Industries, Inc., Livingston-Graham Inc. Division; Symons Corporation, Livingston-Graham Inc. Division; Riverside Cement Company, Livingston-Graham Inc., Division *and* Kris A. Borum

Brown Company, Livingston Division; and successors with liability Gulf & Western Industries, Inc., Livingston-Graham Inc. Division; Symons Corporation, Livingston-Graham Inc. Division; Riverside Cement Company, Livingston-Graham Inc. Division *and* Kris A. Borum. Cases 21–CA–14732–1(B) and 21–CA–14732–2(B)

September 30, 1991

SECOND SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

On June 13, 1990, Administrative Law Judge William J. Pannier III issued the attached decision. The Respondent filed exceptions and a supporting brief and the Charging Party and the General Counsel filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Brown Company; Brown Company, Livingston-Graham Division; Brown Company, Tri-City Concrete Division; L-T Transport, Inc. and successors with liability Gulf & Western Industries, Inc., Livingston-Graham Inc. Division; Symons Corporation, Livingston-Graham Inc. Division; Riverside Cement Company, Livingston-Graham Inc. Division, Vernon and El Monte, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] In concluding that the Respondent's backpay obligation did not end in April 1988, when it terminated its cement train operation, the judge implicitly found that the Respondent's liability would be tolled only if it thereafter offered the discriminatees substantially equivalent employment. This is incorrect in light of our decision in *Mountaineer Petroleum*, 301 NLRB 801 at 802, Member Devaney dissenting at fn. 5 (1991), a decision which the judge did not have the benefit of when he wrote his decision. The Board held that when an employer has lawfully closed the facility at which the discriminatees previously worked, and the employer has no substantially equivalent positions elsewhere, the employer can satisfy its reinstatement obligation by offering the discriminatees nonequivalent positions, in descending order of equivalence, provided that such discriminatees retain the right to transfer to substantially equivalent positions as and when they become available. Further, if the employer makes such an offer, backpay would be tolled.

Consistent with his position in *Mountaineer Petroleum*, supra at fn. 5, Member Devaney agrees with the judge that the Respondent's reinstatement obligations would have been tolled by offering the unlawfully laid-off employees reinstatement to substantially equivalent employment.

[3] On June 14, 1991, the Board issued an order approving a partial settlement agreement entered into by the General Counsel, the discriminatees, and Respondent Symons Corporation, Livingston-Graham Inc. Division (Symons). Under the terms of the approved partial settlement agreement the discriminatees waived all backpay and interest claims against Symons in return for periodic fixed-sum payments, a supplemental order by the Board, and a consent judgment by an appropriate United States court of appeals. The partial settlement agreement does not resolve the issue of pension fund contributions allegedly owed for certain discriminatees, nor does it bar further processing of this case against the remaining Respondents.

We adopt the judge's conclusion that a calendar-year method is appropriate for determining net backpay in this case. Because the Respondent stipulated to the use of that method and has shown no compelling reason to disregard the stipulation, we need not reach the merits of its arguments or the judge's analysis.

Paul H. Fisch, for the General Counsel.
Stuart H. Young Jr. and *James Bowles (Hill, Farrer & Burrill)*, of Los Angeles, California, for the Respondent.
David B. Finkel, of Santa Monica, California, and *Neil M. Herring*, of Sebastopol, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

WILLIAM J. PANNIER III, Administrative Law Judge. I heard this case in Los Angeles, California, on July 18 through 20, 1989, based on a backpay specification and notice of hearing issued by the Regional Director for Region 21 of the National Labor Relations Board (the Board), on May 8, 1989. That specification is based on orders issued by the Board on July 30, 1979 (243 NLRB 769), but remanded by unpublished opinion of the United States Court of Appeals for the Ninth Circuit on September 2, 1981, and on February 28, 1986 (278 NLRB 783), enforced without published opinion by that same circuit court on November 6, 1987 (663 F.2d 1078), certiorari denied on May 2, 1988 (485 U.S. 1039).

In those proceedings, the employers named as Respondent were Brown Company; Brown Company, Livingston-Graham Division; Brown Company, Tri-City Concrete Division; and, L-T Transport, Inc. The Board concluded, and the circuit court did not disagree, that they constituted a single employer within the meaning of the Act (243 NLRB at 769;

278 NLRB at fn. 2). However, since this litigation commenced, several subsequent changes in ownership have occurred. Thus, in December 1980 Gulf & Western Industries, Inc. purchased the Livingston-Graham Division from Brown Company. Then, on September 8, 1983, Symons Corporation purchased that division from Gulf & Western, with knowledge of the unfair labor practices of the single employer and, moreover, with the understanding that it would assume responsibility for making whole the claimants who suffered losses as a result of them. Finally, on April 29, 1987, Riverside Cement Company purchased the Livingston-Graham Division from Symons, again with knowledge of the unfair labor practices proceeding. It is undisputed that Symons Corporation is a successor of Brown Company and, in turn, that Riverside Cement Company is its successor.[1] Therefore, the Employers enumerated in the caption shall be collectively referred to herein as Respondent.

Based on the entire record, on the briefs filed on behalf of the parties, and on my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. BACKGROUND AND ISSUES

This proceeding originates from a relatively straightforward sequence of events that occurred in late December 1975 and in early January 1976. However, they occurred in more complicated circumstances that, in turn, generated a series of compliance issues that have led to this proceeding. The sequence of events was that in 1975 Livingston-Graham Division had been employing 12 drivers to operate seven cement trains—special tractor-trailer trucks designed to haul bulk cement—from locations in Vernon and El Monte, California. As that decade had progressed, those operations were conducted increasingly at a competitive disadvantage. As a result, L-T Transport, Inc. was formed for the purpose of taking over the bulk cement hauling operations that Livingston-Graham Division had been conducting. This occurred on January 2, 1976, with L-T Transport, Inc. using the equipment that had been used by Livingston-Graham Division prior to that date. However, none of the 12 drivers was transferred. Instead, totally different individuals were assigned to drive the cement trains on and after January 2, 1976. Lacking employment as cement train drivers, nine of the former cement train drivers bumped into other jobs with Livingston-Graham Division. Lacking sufficient seniority to follow a similar course, the other three drivers were laid off.

The unfair labor practice proceeding in this matter arose because of the circumstances in which that sequence of events occurred. In 1975, the cement train drivers had been part of a bargaining unit of some 200 Livingston-Graham Division employees represented by Building Material & Dump Truck Drivers Local 420, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO (Local 420). Historically that bargaining unit had been covered by collective-bargaining contracts commonly referred to as ''blue-book'' contracts.[2] However, more favorable economic terms were available to employers who were signatory to a different collective-bargaining contract, the so-called ''for-hire'' contract, to which a number of Teamsters locals, including Local 420, were parties. Because many of its competitors were parties to for-hire contracts, Livingston-Graham Division felt that those contracts were the reason that it was operating at a competitive disadvantage. As a result, it proposed to Local 420 that L-T Transport, Inc. become the operator of the cement trains and employer of their drivers under a for-hire contract. Under this proposal, any of the 12 cement train drivers who chose not to accept that arrangement would be allowed to bump into other jobs, seniority permitting, at Livingston-Graham Division. Initially, Local 420 was favorably disposed toward this proposal. But when all 12 of the drivers objected, Local 420 rejected it. Despite that rejection, the proposal was implemented on December 31, 1975. In light of Local 420's objection, the cement trains were relocated to Redlands, California, thereby removing them from the geographic jurisdiction of Local 420 to that of Local 467, a local union willing to agree that for-hire contracts could be applied to cement train operations.

In its 1979 decision, the Board concluded that the transfer of operations to L-T Transport, with the accompanying cement train relocation, violated Section 8(a)(3) and (1) of the Act, because the sole purpose for that action had been to escape the existing blue-book contract economic obligations by action that partially abrogated that contract. However, the circuit court held that in reaching that conclusion, the Board had failed to examine certain blue-book contractual provisions and it remanded the case so that the Board could do so. The Board again concluded that the Act had been violated. However, it discarded its reasoning under Section 8(a)(3) of the Act in favor of a violation based on Section 8(a)(5) of the Act, because the transfer of operations and cement train relocation had constituted a unilateral midterm modification of the then-existing blue-book contract.

The change in statutory subsection did not affect the affirmative relief ordered by the Board. Thus, to the extent pertinent to this proceeding, the Supplemental Decision and Order, as had the initial Order, directs continued recognition and bargaining with Local 420 in the appropriate historic bargaining unit which includes cement train drivers; that cement hauling operations formerly carried on at Vernon and El Monte be resumed at those two locations, transferring back the cement trains previously relocated to Redlands; and, that immediate and full reinstatement as cement train drivers be offered to the 12 drivers who had been performing that work prior to December 31, 1975, ''or, if their former positions no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for any loss of pay they may have suffered.'' However, the change in violated subsection of the Act necessitated a change in the cease-and-desist portion of the Board's Order. In the one issued in 1979, the Board directed that there be no discontinuance of cement hauling operations at Vernon and El Monte, and no sale and transfer of trucks used to conduct those op-

[1] No similar allegation is made concerning Gulf & Western Industries, Inc., whose ownership of the Livingston-Graham Division occurred after issuance of the Board's 1979 Order and, furthermore, during the initial 2-year period after the Ninth Circuit's remand of this proceeding.

[2] These were multiemployer-multiunion contracts between Rock Products and Ready Mixed Concrete Employers of Southern California and a number of Teamsters local unions.

erations there, nor discontinuance of any other work encompassed by the blue-book contract with Local 420, with the object of escaping obligations imposed by that contract. In contrast, the Supplemental Order substituted the following cease-and-desist order:

> While its current collective-bargaining agreement with [Local 420] is in effect, discontinuing its cement hauling operations at Livingston-Graham's Vernon and El Monte locations and selling and transferring its trucks to L-T Transport, Inc. at Redlands, without Local 420's consent.

In view of the passage of time since commission of the unfair labor practices, and concomitant number of events that occurred over so long a period, a myriad of compliance issues are presented. First, in 1977 Respondent secured Local 427's agreement to apply for-hire contract terms to cement train drivers and retransferred the cement trains back to Vernon and El Monte. They were operated from those locations until April 1988, when Respondent sold the last of them and ceased altogether operating cement trains. Nevertheless, the General Counsel and the Charging Party contend that Respondent remains obliged to resume cement train operations out of Vernon and El Monte, because it has never resumed conducting operations there under blue-book, as opposed to for-hire, contracts.

Second, because no reinstatement offers ever have been made to any claimant, the General Counsel, supported by the Charging Party, argues that the overall backpay period is ongoing, although conceding that backpay periods for 10 claimants have concluded due to particular circumstances unique to each of them. In contrast, Respondent argues that since the discharges were held to be unlawful under Section 8(a)(5) of the Act, it has complied with the remedial order by negotiating a new blue-book contract in September 1977 or, alternatively, by securing Local 420's agreement during the following month to apply for-hire contract terms to cement trains operating from Vernon and El Monte. Even if those arguments are rejected, argues Respondent, the overall backpay period should toll as of April 1988, when cement train operations ceased.

Third, independent of the overall backpay period dispute, Respondent argues that the backpay period for claimants Robert Reilly and Kris A. Borum must conclude earlier than is alleged by the General Counsel and the Charging Party. In Reilly's case, Respondent asserts that his backpay period should culminate when he suffered a disabling injury on April 4, 1985, or, if not on that date, on August 1, 1986, when he retired. However, the General Counsel contends that Reilly's injury had been incurred while, in effect, engaging in interim employment and, further, was of a type that would not have occurred had Reilly been operating a cement train. Moreover, asserts the General Counsel, Reilly did not intend to retire until his 62d birthday, on January 10, 1989, but had been forced to retire prematurely in 1986, because his injury prevented him from operating a cement mixer truck, the work that he had been assigned to perform by Respondent. In these circumstances, the General Counsel argues, Reilly's backpay period should not toll until January 10, 1989.

In the case of Borum, Respondent argues that her testimony and a certain other incident demonstrate that she was attempting to pervert the compliance proceeding by concealing evidence of her interim earnings and, consequently, that she should be barred altogether from receiving backpay or, at least, should be barred from receiving it during the time that she was self-employed as an owner-operator. Alternatively, Respondent contends that her backpay period should toll from July 14, 1976, because she abandoned further employment with Respondent as a cement mixer truckdriver. Respondent also denies, contrary to the specification's allegation, that it must reimburse Borum for certain yearly health care expenditures that she incurred from 1986 through 1988: $335 for basic hospital and medical coverage, $178 for vision care, and $215 for prescription drugs. In doing so, Respondent asserts that it has no information that such expenditures actually were made by Borum.

Fourth, the General Counsel has computed backpay using calendar years, instead of calendar quarters, due to the difficulty in locating sufficient records. Respondent does not take issue with the rationale for this substitution. However, it argues that since the underlying violations were based on Section 8(a)(5) of the Act, there should be only a single, unsegmented backpay period, under the doctrine of *Ogle Protection Service*, 183 NLRB 682 (1970), thereby allowing excesses of interim earnings over gross backpay for 1 year to be carried over to offset gross backpay for other years.

Fifth, there is no argument about the method for calculating the multiplicand of the gross backpay formula: for each year through 1987, dividing average total number of average regular and overtime hours worked by cement train drivers who drove that full year for Respondent, and for 1988 and January 1989, dividing the number of years from 1976 through 1987 into the total number of average regular and overtime hours worked by cement train drivers who drove for a full year for Respondent during each particular year. However, there is a dispute concerning the appropriate multiplier used to determine the gross backpay. The General Counsel and the Charging Party argue that the appropriate pay rate should be the one set forth in the successive blue-book contracts effective over the course of those 13 years and 1 month. In contrast, Respondent contends that, since it violated Section 8(a)(5) of the Act and since Local 420 agreed ultimately to apply for-hire contract terms to cement trains operated from Vernon and El Monte after September 1977, therefore rates from successive for-hire contracts should be used as the multiplier for computing gross backpay. In support of their alternative theories, the General Counsel and the Respondent each have submitted calculations for each claimant. Subject to resolution of the fourth issue described above, each agrees to the mathematical accuracy of the other's calculations, depending on the multiplier chosen.

Sixth, Respondent denies that it must make retroactive contributions to the Western Conference of Teamsters Pension Trust on behalf of claimants Borum, Reilly, Clarence Hudson, and James Jaworski. Neither its answer nor its posthearing brief explicate the basis for this denial. Presumably, it has been advanced to be consistent with the second above-enumerated issue, pertaining to duration of the backpay period. That is, if the backpay period tolled on one of the earlier dates specified by Respondent, then it would follow that no pension contributions would be owing for later months. Similarly, consistent with its contention regarding

the multiplier, set forth above as the fifth issue, Respondent asserts that if there is a determination that it must make retroactive pension contributions, then their amounts should be calculated under for-hire, as opposed to blue-book, contract rates.

Seventh, with respect to Reilly, Respondent argues that if there is a determination that his backpay period extends to January 10, 1989, then an additional deduction of $674 should be made for each month after July 1986, because he received that amount during each retirement month from the pension trust. In opposition, the General Counsel asserts that those amounts should not be deducted, because Reilly will have to repay $674 to the trust for each month of his retirement for which he receives backpay.

Eighth, concerning Borum, Respondent contends that even if she is awarded backpay, and awarded it for the period after July 14, 1976, the evidence discloses that her interim earnings were understated in the specification and, further, that there were periods when she was ill and unavailable for work during which her backpay period should be tolled. In fact, after the hearing closed, the General Counsel did recalculate Borum's backpay to reflect the evidence presented at the hearing. However, along with the Charging Party, the General Counsel opposes further revision of Borum's net backpay on the basis that it is not warranted by the evidence.

Finally, all parties agree that, on December 30, 1988, Respondent offered to employ Borum as a new employee working off the extra board. However, the General Counsel and the Charging Party challenge Respondent's contention that the offer sufficed as a valid one for reinstatement, with the result that Borum's backpay period tolled as of that date.

II. RESTORATION OF CEMENT TRAIN OPERATIONS

This is not an issue covered, nor even contemplated, by the remedial order. Prior to issuance of the Supplemental Decision and Order, and of the circuit court's judgment, one or another of the entities comprising the single employer had been continuing to conduct cement train operations. Consequently, as Respondent points out in its brief, the remedial order was unconcerned with which of those entities actually continued to operate cement trains, so long as they were retransferred back to Vernon and El Monte. In that respect, retransfer sufficed to restore the status quo ante.

Not encompassed by the remedial order was a situation where none of the entities comprising the single employer, nor any of their successors, engaged at all in cement train operations. Yet, that is the very situation presented. By the late 1970s or early 1980s, the magnitude of demand for cement in the Los Angeles market had outgrown domestic sources of supply. As a result, cement began to be imported for that market. However, the haul rate for cement from the Los Angeles harbor, where imported cement is picked up, is significantly lower than the rate for cement hauled from domestic sources. For example, Anton Dyck, Respondent's vice president and general manager, testified without contradiction that it cost Respondent approximately 30 to 35 cents per hundredweight to deliver cement from the harbor to downtown Los Angeles, but that Respondent received only 21-1/2 cents per hundredweight for doing so.

Apparently, this was not an immediate problem for Respondent, because imported cement was not a great proportion of the cement market. However, as the years passed, the volume of imported cement grew in relation to cement obtained from domestic sources. Indeed, by the time of the hearing, Dyck testified that imported cement sales constituted 90 to 95 percent of the Los Angeles market. Faced with this situation, Respondent began to cease repairing cement trains that broke down. In fact, when one of them burned in 1983, Respondent simply did not replace it. In December 1987, Respondent made a decision to phase out cement hauling operations and to dispose of its by-then unrepaired, but admittedly repairable, cement trains. The last one was sold in April 1988.

Nothing in the remedial order obliges Respondent to continue cement hauling operations in perpetuity. As quoted in section I, supra, Respondent had been ordered only to cease and desist from ''discontinuing its cement hauling operations . . . at [the] Vernon and El Monte locations *and* selling and transferring its trucks to L-T Transport, Inc. at Redlands.'' (Emphasis added.) The entire thrust of the Board's Order, and of its underlying decision, was to prohibit a shell game from being conducted among the various entities that comprised the single employer—to prevent them from escaping blue-book contract terms by relocating cement trains to another of the single employer's entities. Beyond that prohibition, the order is silent.

Pointing to the fact that the Respondent's decision to phase out cement hauling operations was made during the month immediately following the one in which the judgment was filed, the General Counsel argues that there had been a causal relationship between the two events: ''It is clear[] that Respondent took the action for the s[o]le purpose [of] avoid[ing] having to place its cement trains under the 'Blue Book' agreement.'' Yet, if that had been the fact—if Respondent truly had been so motivated—its discontinuance of cement hauling operations would have constituted an unfair labor practice, just as the Act earlier was violated by their relocation to avoid continued application of the blue-book contract's terms. However, there has been no decision to that effect by the Board. Indeed, so far as the record shows, there has been neither charge nor complaint making that allegation.

To the extent that a compliance proceeding in one case might serve as a springboard for litigating unfair labor practices occurring after issuance of the order that generated that compliance proceeding, there was no notice here of that intention. The specification alleges only that Respondent remains obliged to ''reinstate operations of the cement trains under the Blue Book Agreement as mandated by the Board's Supplemental Order, as enforced by the Court.'' At no point during the hearing was the specification amended, nor was any representation of counsel made, that would have provided notice that restoration was being sought on a basis independent of the scope of the Order issued as a result of the 1975–1976 unfair labor practices.

In sum, there is no basis in this compliance proceeding for ordering Respondent to do something that the Board has not directed it to do and, further, for ordering Respondent to do so because it did something that the Board did not prohibit it from doing. Especially, is this so where such an order must be based on conduct that has not been determined by the Board, after notice and hearing, to be a violation of the Act. In this connection, it is worth noting that to comply with a restoration order in this case, Respondent would have to make capital expenditures to purchase equipment necessary

to resume an operation that it previously could not operate profitably. Such an order might well be construed as ''unduly burdensome.'' *Lear Siegler, Inc*., 295 NLRB 857 (1989). See, e.g., *Hood Industries*, 273 NLRB 1587 (1980), and *Triumph-Adler-Royal*, 298 NLRB 609 (1990). In any event, concern in seeking and opposing it appears to have been motivated by a belief that its resolution will affect other issues. As discussed infra, this simply is not the fact.

III. BACKPAY PERIOD DURATION

A. *Overall Backpay Period*

As stated in section I, supra, Respondent argues that the overall backpay period should conclude in September 1977, when it negotiated a successive blue-book contract with Local 420, or, alternatively, during the following month, when it secured Local 420's consent to apply for-hire contract terms to cement trains operated from Vernon and El Monte. Respondent based these alternative arguments on the fact that the violations in this case occurred under Section 8(a)(5) of the Act and, accordingly, ''the period for a make-whole remedy in a Section 8(a)(5) case terminates at such time as the employer bargains in good faith to an impasse or a contract.'' However, contrary to the situations underlying the treatise propositions relied on to support that argument, this case did not present a situation where an employer discontinued an operation without satisfying its bargaining obligation. Instead, as pointed out in section II, supra, Respondent continued to conduct cement train operations, albeit from a different location, after December 31, 1975. It simply replaced the drivers who had been driving those vehicles.

As a remedy for that type of violation of Section 8(a)(5) and (1) of the Act, to the extent pertinent here, the Board ordered, with subsequent approval by circuit court, Respondent to do two things: retransfer cement train operations to Vernon and El Monte and, second, offer reinstatement to the 12 drivers who had been deprived of operating cement trains as a result of the unlawful relocation of the vehicles to Redlands. It is not disputed that there never has been compliance with that second affirmative order: Respondent did not offer reinstatement to any of those 12 claimants. ''An employer may toll its backpay liability by offering reinstatement to employees improperly dismissed,'' *Canova v. NLRB*, 708 F.2d 1498, 1505 (9th Cir. 1983), but until such an offer is forthcoming, ''Respondent's obligation continues to accrue.'' (Citation omitted.) *Stevens Ford, Inc*., 271 NLRB 628 fn. 2 (1984). Consequently, because Respondent never has fulfilled its obligation to offer reinstatement to any of the 12 claimants, the overall backpay period is not shortened by its history of bargaining with Local 420 during and after September 1977.

Furthermore, the ongoing duration of the overall backpay period is not affected by Respondent's discontinuance of cement train operations in 1988. As quoted in section I, supra, the Board's affirmative reinstatement order provides that if the claimants' former position no longer exists, they are to be offered substantially equivalent positions—and that offer is to be made ''without prejudice to [the claimants'] seniority or other rights and privileges previously enjoyed.'' There is no evidence that Respondent made such an offer to any of the claimants during and after April 1988. True, as noted in the final issue enumerated in section I, Respondent did offer to employ Borum as a new employee working off the extra board. But, Respondent has not shown that such employment is substantially equivalent to the position of fulltime cement train driver. To the contrary, the offer to rehire Borum as a new employee ''connotes loss of seniority and accrued benefits,'' *Canova v. NLRB*, supra, and, as such, fails to comply with the express terms of the reinstatement order. Therefore, neither the offer of employment to Borum in December 1988, nor the Respondent's discontinuance of cement train operations earlier during that same year, served to toll the ongoing overall backpay period.

Nor was the reinstatement obligation satisfied, and the backpay period of individual claimants concomitantly cut off, by the fact that, following relocation of cement trains to Redlands, Respondent provided other jobs to most, if not all, of the 12 claimants. So far as the evidence shows, bumping into other jobs occurred prior to April 1988. Accordingly, it took place at a time when Respondent was continuing to operate cement trains. But, reemployment does not constitute reinstatement. See *Colorflo Decorator Products*, 228 NLRB 408, 420 (1977), enfd. mem. 99 LRRM 3327 (9th Cir. 1978); *Canova v. NLRB*, supra. For example, relatively extensive evidence was adduced concerning the comparative merits of operating cement mixer trucks versus cement trains. Yet, even if driving the two types of vehicles is identical in complexity and desirability, an offer of employment driving the former does not satisfy a reinstatement order to a job driving the latter, so long as Respondent continued to operate cement trains. ''Generally, when . . . the NLRB orders reinstatement to [employees'] former or substantially equivalent positions, the employer does not have a choice. . . . If the former position still exists, he must offer that one.'' *NLRB v. Jackson Farmers, Inc*., 457 F.2d 516, 518 (10th Cir. 1972). See also *NLRB v. Draper Corp*., 159 F.2d 294, 297 (1st Cir. 1947). To toll the backpay period, ''a full and unconditional offer of reinstatement to the employee's former position is required.'' *Oil Workers v. NLRB*, 547 F.2d 598, 601 fn. 3 (D.C. Cir. 1976), cert. denied 429 U.S. 1078.

Inasmuch as Respondent retransferred the cement trains to Vernon and El Monte, but never offered to reinstate any of the 12 claimants as their drivers, and inasmuch as there is no evidence of substantially equivalent employment offers following discontinuance of cement train operations in April 1988, the overall backpay period never has tolled. For eight of the claimants, that conclusion resolves any further questions concerning the duration of their backpay periods which commenced on January 1, 1976: Louis Bering, to December 31, 1988; William Cannon, to April 27, 1984; Anthony Giangreco, to November 30, 1976; Clarence Hudson, to May 26, 1976; James Jaworski, to December 8, 1977; Harry Potts, continuing after January 31, 1989;[3] Carmon Rosselli, to August 31, 1984; and, James Wilson, to July 29, 1988.[4] Furthermore, this also resolves the question of Respondent's obligation to pay retroactive pension contributions on behalf of Hudson and Jaworski during the backpay period of each of them, an issue enumerated as the sixth one in section I,

[3] There was no challenge to the reservation for further determination of the ''obligation of Respondent to all discriminatees [sic] . . . for all periods after January 31, 1989.''

[4] For two other claimants, Donald Thomas and Robert Shaffer, settlements were negotiated prior to commencement of the hearing and the motion was granted to delete their names from the specification.

supra. Of course, still remaining for consideration is the separate issue of the proper multiplier to be utilized in calculating the gross backpay and the amount of pension contributions. That subject is discussed infra.

B. *Backpay Period for Kris A. Borum*

As set forth in the third issue enumerated in section I, additional arguments have been advanced by Respondent with regard to the individual backpay periods of Borum and of Reilly. The most significant of these is the argument that Borum attempted to conceal interim earnings and, so, should be denied backpay under the doctrine of *American Navigation Co*., 268 NLRB 426 (1983). In making that argument, Respondent relies on a series of factors: that her testimony was inherently incredible when she claimed that fear of being fired had motivated her not to file a workers compensation claim after her injury in 1976, when she had been operating a cement mixer truck for Respondent; the equivocal, and sometimes assertedly inconsistent and inaccurate, nature of her testimony concerning her period of self-employment and her subsequent period of employment with Blue Marlin Restaurant; the fact that she filed no income tax return for her self-employment period and possessed few financial records from that period; her equivocal testimony that she ''could'' have earned amounts exceeding those enumerated in the specification as interim earnings and the asserted efforts to conceal certain documents from a separate lawsuit, purportedly showing that to be a fact; and, her general lack of recall and inexactitude when questioned by Respondent's counsel, in contrast to her more precise answers when responding to questions of her own counsel and the General Counsel.

A claimant will be precluded from all, or a portion, of backpay whenever the record establishes that he/she has ''attempt[ed] to pervert an order issued in the public interest into a scheme for unjustified personal gain.'' *American Navigation Co*., supra at 428. To satisfy that standard, there must be a showing of intention to accomplish that result, such as by ''intentionally conceal[ing] interim employment from the Board.'' (Citations omitted.) *Ad Art, Inc*., 280 NLRB 985 fn. 2 (1986). This is so because deprivation of backpay constitutes ''denial of the normal remedy [which] leaves the effects of the Respondent's unlawful conduct unremedied and thus fails to effectuate the policies of the Act.'' (Citations omitted.) *Owens Illinois*, 290 NLRB 1193 (1988).

As a result, a claimant is not deprived of backpay merely because he/she failed to maintain perfect records of interim employment, nor because he/she failed to report all interim earnings to the Board during the compliance investigation. *Big Three Industrial Gas & Equipment Co*., 263 NLRB 1189, 1190–1191 (1982). Absent a showing of deliberate withholding or destruction of records, or of attempts to deceive the Board, *Kansas Refined Helium Co*., 252 NLRB 1156, 1159–1160 (1980), enfd. 683 F.2d 1296 (10th Cir. 1982), a claimant is entitled to backpay in spite of ''poor recordkeeping, uncertainty as to memory, and perhaps exaggeration.'' *Pat Izzi Trucking Co*., 162 NLRB 242, 245 (1966), enfd. 395 F.2d 241 (1st Cir. 1968). Indeed, it has been held that even a claimant's lack of total candor regarding efforts to seek interim employment does not satisfy the standard imposed for disqualification from backpay. *McDonnell Douglas Corp*., 270 NLRB 1204 fn. 3 (1984); *Service Garage, Inc*., 256 NLRB 931 (1981).

Here, a preponderance of the evidence is not sufficient to establish a deliberate intention by Borum to conceal interim earnings, nor to otherwise deceive the Board and frustrate an accurate compliance determination. Due to her seniority standing, as a result of the unlawful relocation of cement trains, Borum was laid off on December 31, 1975. In May of the following year, she was recalled by Respondent to operate a cement mixer truck, a job that did not constitute reinstatement for the reasons set forth above. On June 4, 1976, she sustained an injury, discussed more fully in section VI, infra, that she testified had been work related. On July 14, 1976, she submitted to Respondent a physician's report which, although entitled ''*RELEASE FOR WORK*,'' specified that she was ''Not to return to work until physically capable.'' In fact, she never did return to work for Respondent. Instead, she purchased her own tractor and began self-employment as an owner-operator on August 1, 1976. However, the tractor was repossessed in February 1979. She testified that all her records had been in the tractor and that they had disappeared by the time that she later had been allowed access to it. As a result, she was unable to provide added documentation regarding her interim employment—with one exception.

That exception arose as a result of her testimony when called as a witness by Respondent. Borum had been living in Texas and had returned to California for this hearing. In response to questions by Respondent's counsel about her lack of records, Borum mentioned that, ''I searched my dad's garage when I got in Thursday, and I found one small case of records,'' which she had placed in the automobile in which she had ridden to the hearing. The record does not indicate that counsel for the General Counsel had been aware of the records' existence. Apparently, counsel for the Charging Party had been aware of their existence, but had not reviewed them before Borum testified. As requested, Borum brought them to the hearing room and delivered them to Respondent's counsel. However, before they actually were turned over, counsel for the Charging Party removed some documents from the case. This generated a dispute between counsel over whether or not those removed documents also should have been turned over to Respondent. As it turned out, an initial assertion of attorney-client privilege was without merit and, ultimately, the removed documents were turned over. Some of them then were utilized to further interrogate Borum. Others suggested an avenue that led to posthearing admission of additional documents, obtained from sources other than the small case, bearing on the amount of Borum's interim earnings while self-employed, as discussed in section VI, infra.

It is essentially on these facts that Respondent bases its argument that Borum should be barred from receiving backpay. Yet, she appeared to be attempting to testify truthfully. It is accurate that there were variances between portions of her account and the specification's recitation of interim earnings. However, amounts of interim earnings enumerated in specifications show no more than the General Counsel's ''willingness to admit without proof objectively verifiable facts which go to diminish the maximum amount of the wage loss in order to expedite the hearing process.'' *Heinrich Motors*, 166 NLRB 783, 783 (1967), enfd. 403 F.2d 145 (2d Cir. 1968). A variance could arise from a claimant's lack of candor in reporting interim earnings during the compliance investiga-

tion. But it also could arise because of an insufficient prehearing investigation or due to a claimant's imprecise memory in reporting interim earnings to the General Counsel. Here, there is no evidence that Borum deliberately misled the General Counsel during the prehearing compliance investigation. That is, there is nothing that would support such a conclusion to the exclusion of the other two possibilities: insufficient investigation or imprecise memory of Borum.

Indeed, it was my impression that genuine lack of memory caused most of the infirmities in Borum's testimony to which Respondent now points, in arguing that she should be barred totally from receiving backpay. She testified at the end of a decade about events that had occurred at the beginning of that decade, as well as about events occurring during the preceding decade. ''[T]he lapse of time between [those events] and [the] current proceeding necessarily had the effect of limiting the evidence available.'' *Kansas Refined Helium Co*., supra, 252 NLRB at 1160 (relying on *Bagel Bakers Council of New York*, 226 NLRB 622, 626 (1976)). In light of that time lapse, it is not surprising that her memory, unaided by prior examination of records lost when her tractor had been repossessed, was imperfect.

Nor is it surprising that her recollection was imperfect when she was interrogated by Respondent's counsel, but was more precise when she was interrogated by her own counsel and by the General Counsel. Respondent had been the initial party to call Borum and its counsel had been the first one to question her about the specific facts of her interim employment. Obviously, counsel had not had an opportunity to meet with Borum before the hearing to review what areas would be covered by his interrogation—to alert her to subjects about which she should be thinking to improve her recollection before being called as a witness. Borum testified that after these subjects had been raised during Respondent's examination, she was able to begin thinking about what she had been asked and to begin recalling more specifically what had occurred. As a result, she was able to answer more explicitly when later questioned about these same subjects by the General Counsel and by her own counsel. That explanation is logical and it was advanced by Borum with seeming honesty.

Indeed, at several points Borum gave testimony that tended to favor Respondent's position—testimony that she likely would not have given if she truly had been attempting to engage in deception to secure backpay higher than the amount to which she is entitled. Thus, her response that she ''could'' have earned more than the interim earnings' figures enumerated in the specification for particular years was testimony that aided Respondent's effort to reduce the amount of her net backpay. Borum impressed me as a perceptive individual who seemed to appreciate the consequences of that testimony. That, nonetheless, she conceded that there ''could'' be added earnings tends to enhance her credibility, rather than to diminish it, as Respondent contends. Most significantly, if she had been attempting to conceal interim earnings, it is highly unlikely that she freely would have revealed the existence of the case that she had located in her father's garage. There is no evidence that Respondent had been aware of it. Nor is there any basis for concluding that Borum could have perceived that Respondent would have unearthed its existence, by other means, if she did not admit that it existed. Nevertheless, she freely volunteered that there was a case of records and she freely offered to submit it for Respondent's inspection.

True, production of the case led to a heated dispute over the obligation to produce certain items. In fact, in the end, the argument against production not only was incorrect, but was based on representations that were not accurate. Yet, there is no evidence that Borum, personally, had been responsible for this state of affairs. To the contrary, her testimony was a partial cause for ultimate production of the remaining documents from the case. In such circumstances, her credibility should not be impaired by someone else's spontaneous adversarial reaction, creating ''a Donny Brook fair . . . for the feel of the fighting.'' *Winn & Lovett Grocery Co. v. NLRB*, 213 F.2d 785, 786 (5th Cir. 1954).

Obviously, no one condones such matters as failure to file federal income tax returns. But violation of other statutes does not bar the Act's protection. See, e.g., *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984). Nor does it require that a witness not be credited. Although I have considered these factors, as well as the other evidence underlying Respondent's contentions, I felt that Borum was a candid witness when she testified and nothing in my review of the record leads me to reverse that conclusion. Moreover, there is no independent evidence that would support the conclusion that Borum has been deliberately withholding information in an effort to deceive the Board and to frustrate its compliance proceeding. Therefore, I conclude that the amount of her backpay should not be diminished under the doctrine of *American Navigation Co*., supra.

Nor do I agree with Respondent's alternative argument that Borum's backpay period should toll because she never returned to work as a cement mixer truck driver after June 4, 1976. Borum testified that she never did so, because she regarded the job of cement mixer driver to be an undesirable one. To support that assertion, she enumerated a series of aspects of mixer driving that were difficult for her and that she did not encounter when driving cement trains: carrying 40 to 60-pound chutes from the fender to the back of the mixer, lifting those chutes to attach them so that cement could pour down them from the mixer to the jobsite, and having to sometimes twist a chute and pound on it with a hammer to get it to attach before pouring and to disattach after the pour was completed. Although evidence was adduced that some drivers regarded mixer truck driving as preferable to cement train driving, there was no dispute about the fact that differences did exist and that the above-described tasks had to be performed by a mixer driver, but not by a cement train driver.

While Respondent now disputes the fact, a preponderance of the evidence supports the conclusion that Borum did sustain a work-related injury on June 4, 1976, while operating a cement mixer truck. She testified that her shoulder had been injured when a chute fell on her. There is no evidence contradicting that testimony. To the contrary, on that very date, Plant Manager Ed Papp prepared an industrial accident report, reciting that Borum had been injured by a falling chute. She was sent for emergency treatment at Chatsworth Medical Center. Six days later, a doctor selected by Respondent examined her and prescribed daily physical therapy for a 2-week period, after which she was to return, on June 24, 1976, for further examination by him. However, Borum did not complete the therapy and did not return to the doctor.

Instead, she chose to undergo chiropractic treatment. Unaware of Borum's decision, on July 7, 1976, Respondent sent her a letter, telling her to report for work with either a doctor's release or a doctor's statement concerning treatment for a continuing disability. The letter concluded with the warning that, ''If you fail to do either of these requirements . . . , your employment will terminate as a voluntary quit.''

In response to that letter, Borum submitted the above-described ''release.'' So far as the record discloses, Respondent never questioned the legitimacy of Borum's continued disability and never terminated her employment in 1976. Rather, it continued her status as its employee until June 6, 1977, when it nondiscriminatorily discharged her for failing to perform work during the preceding 1-year period. Consequently, at no point during 1976 and 1977 did Respondent challenge the fact that Borum had been injured and, further, that the injury had been a work-related one.

Now, it argues that her failure to file a workers' compensation claim in connection with that injury shows that it had not been a work-related one. Yet, nowhere is it written that such a claim must be filed as a condition precedent for establishing that an injury is work related. Moreover, Borum testified that she had not done so because she feared that, if she did, Respondent would no longer consider her for employment. Regardless of whether Respondent is, or is not, disposed to retaliating against employees who file workers compensation claims—an issue not before me—there is no evidence contradicting Borum's testimony that she genuinely harbored such a fear. Nor, in light of her unlawful layoff only a few months earlier, is there a basis for saying that she acted irrationally and without any justification in formulating that fear. Accordingly, I conclude that Borum did suffer an injury while operating a cement mixer truck on June 4, 1976. Further, I conclude that it was the type of injury that could not have occurred had she been operating a cement train, based on Borum's uncontradicted testimony that nothing involved in driving a cement train could have caused the shoulder injury that she sustained from the falling chute.

In the foregoing circumstances, Borum's backpay should not toll because she abandoned further interest in driving a cement mixer for Respondent. As concluded above, regardless of the comparative desirability of driving one or the other type of truck, employment as a cement mixer driver did not suffice as reinstatement for an unlawfully displaced cement train driver. Moreover, the differences between driving the two types of vehicles were such that Borum legitimately felt that regularly continuing to drive a mixer was too strenuous. Indeed, she had been injured doing so. In this connection, Respondent points to her testimony that she always had wanted to be an owner-operator and, based on that testimony, contends that Borum's decision to abandon further mixer truck employment had nothing to do with its desirability. Rather, argues Respondent, she simply chose to indulge a longstanding ambition and Respondent should not be held responsible financially for her lack of success in that endeavor.

Despite her longstanding desire to become an owner-operator, Borum denied expressly that she had contemplated actually trying to become one as of the date of her injury. Certainly, there has been no evidence produced to show that, prior to June 4, 1976, she had engaged in any conduct that would tend to indicate that she had been preparing to become self-employed. Accordingly, a preponderance of the evidence does not support the contention that Borum used her injury as a pretextual excuse for an endeavor that she had intended all along to pursue. Furthermore, there is no evidence showing that, during mid-1976, Borum could not, and did not, fairly anticipate that self-employment would not be successful. In fact, as discussed in section VI, infra, she did not become a successful owner-operator. However, absent some showing that such a result could reasonably have been anticipated in mid-1976, there is no basis for diminishing her backpay because her self-employment turned out to be a failure. For, ''the principle of mitigation of damages does not require success; it only requires an honest and good faith effort.'' *Cashman Co. v. NLRB*, 223 F.2d 832, 836 (1st Cir. 1955). Nothing in the record shows that Borum failed to satisfy that standard of conduct.[5] ''It is indisputable that self-employment is an adequate and proper way for the injured employee to attempt to mitigate his loss of wages.'' (Citations omitted.) *Heinrich Motors v. NLRB*, supra, 403 F.2d at 148.

The fact that Borum would be driving a vehicle other than a mixer truck does not show that she had abandoned further interest in employment with Respondent. It shows only that, as the doctor recited in his ''release,'' she could not drive one particular type of truck. That she could have driven other types is shown by the fact that, at some point between June 14 and August 1, 1976, she drove a tractor-trailer to make a haul for Fox Hollow from Los Angeles to Nevada City, in the process mitigating her loss by the $276.18 that she received for doing so. Yet, Respondent never offered her a job driving another type of truck. So far as the record shows, it never even indicated to her that an alternative type of vehicle could be made available for her to drive.

In fact, contrary to the implication of Respondent's argument, Borum's effort at self-employment contained a potential benefit for Respondent. For, considerably less net backpay could have resulted from her self-employment earnings, had the latter turned out to be greater in amount. In contrast, there is no indication of how long she would have been unable to resume cement mixer truck driving, due to her disability, after July 14, 1976. Although Respondent argues that her backpay period should toll from June 4 through July 14, 1976, an issue discussed in section VI, infra, it does not contest liability for backpay thereafter, presumably due to the doctor's ''release.'' As a result, it is not disputed that unmitigated backpay liability would have continued for an undetermined period, until Borum again was able to drive a cement mixer truck, but for her independent efforts to drive another

[5] Based on dicta in four cases, Respondent argues that where self-employment generates ''little or nothing'' in earnings, it continues as appropriate interim employment only if the self-employed claimant begins to seek other employment. However, it is settled that ''a person is not required to look for other employment while he is reasonably engaged in self employment.'' (Citation omitted.) *Heinrich Motors v. NLRB*, 403 F.2d 145, 149 (2d Cir. 1968). See also *F. E. Hazard, Ltd*., 297 NLRB 790 (1990). Nor is Respondent's proposition a logical one. For, it would oblige self-employed claimants to divide their efforts, by seeking employment while continuing, at the same time, to succeed in self-employment. As a result, time and effort spent pursuing one alternative would detract from time and effort that could be directed to the other, thereby diminishing the potential success of both.

type of vehicle, first for Fox Hollow and, then, as a self-employed individual. Therefore, I conclude that Borum's backpay period should not toll, nor her amount of backpay be diminished, because she chose to become self-employed, rather than wait to resume driving a cement mixer truck for Respondent, once she again was physically able to do so.

Inasmuch as the duration of Borum's backpay period is ongoing, it follows, as it did with respect to Hudson and Jaworski, that Respondent must make appropriate retroactive pension contributions on her behalf. In addition, as mentioned in section I, supra, the specification alleges that Respondent is obliged to reimburse Borum for certain health care expenditures from 1986 through 1988. However, Respondent denied being obliged to make such payments to Borum, in part, because it had no knowledge that she actually had made those expenditures. No evidence was presented to show that she had done so. Accordingly, there is no basis upon which Respondent can be ordered to pay Borum for asserted expenditures that the record fails to show that she ever made.

C. *Backpay Period for Robert Reilly*

The General Counsel contends that Robert Reilly's backpay period terminated on January 10, 1989, when he became 62 years old and had planned to retire. However, Respondent contends that his backpay period should end either in 1985, when Reilly was unable to return to work due to an injury, or after August 1, 1986, when he actually did retire. In response, the General Counsel argues that Reilly sustained his injury while working for Respondent as a cement mixer truckdriver, a position not substantially equivalent to that of cement train driver, and that, thereafter, he was forced into early retirement because he could no longer perform the duties of that position and Respondent offered him no alternative employment, even though by that time it was operating cement trains from Vernon and El Monte.

Reilly had been on vacation when the unlawful relocation of cement trains to Redlands had occurred. Because his position no longer existed when he returned, he bumped into the position of cement mixer truckdriver. He continuously drove a mixer until the spring of 1985. After work on April 4, 1985, Reilly experienced pain in his right shoulder. By the evening of the following day, his shoulder began to hurt so badly that he scheduled an examination by Dr. Mike My Lehoang, a physician selected by Respondent, on April 10, the earliest available date he could obtain. As a result of the examination, the doctor prescribed treatment with Feldene and a course of physical therapy during the following 2-week period. For that 2-week period, Dr. Lehoang recommended that Reilly be placed on total temporary disability. Nevertheless, he attempted to work on April 11 and 12, but continued to experience pain. Accordingly, Reilly was placed on disability status and filed an industrial accident report on April 13.

As it turned out, Reilly was off work for almost 2 months. At Dr. Lehoang's suggestion, he returned to work as a mixer driver on June 3. In a letter to CNA Insurance, the doctor explained that he had recommended that Reilly ''do full work so that determination can be done as to weather [sic] he can handle his usual and customary chore[s].'' Although Reilly worked through September 25, he continued to experience shoulder pain and had difficulty lifting chutes. Ultimately, he concluded that he had been returned to work too soon and went to another doctor. That doctor concluded that Reilly had a torn rotator cuff and operated to repair it on September 26, 1985.

Thereafter, Reilly was off work until April 2, 1986. On the preceding day, his doctor had suggested that he return to ascertain ''if you can do the work.'' On returning to work as a cement mixer driver, Reilly continued to experience pain when lifting chutes. In fact, he was unable to carry, and to attach and disattach, them without assistance from someone else. After performing arthroscopic surgery on the same shoulder, the doctor concluded, on July 18, 1986, that Reilly was physically unable to perform the job of cement mixer driver. There is no evidence that Respondent offered to let him drive another type of truck. Thus, on July 25, Reilly took early retirement, effective August 1, 1986, although he testified that it had not been his plan to retire until he reached the age of 62, on January 10, 1989. Following his retirement, Reilly received a monthly early retirement benefit of $674 from the pension trust.

Initially, Respondent contends that Reilly's backpay period should terminate as a result of his physical disability on April 4, 1985. In so contending, Respondent argues that the evidence is not sufficient to show that the injury was work related and, further, that the evidence is not sufficient to support the conclusion that the rotator cuff surgery had been necessitated by any injury that Reilly may have incurred during that month. Alternatively, Respondent contends that the duration of Reilly's backpay period should end as of the time that he actually retired, since he made no effort to obtain employment from Respondent in any capacity other than driving cement mixers and, in any event, the Board should not make, in effect, open-ended disability awards based simply on an employee's word.

At no point did Reilly claim that he could say with absolute certainty that his shoulder had been injured while working on April 4, 1985. He had a history of bursitis and tendonitis in both shoulders. On the industrial accident report, he wrote that he did ''NOT REMEMBER ANY SPECIFIC INCIDENT THAT OCCURRED THAT CAUSED THE INJURY.'' However, when he testified, Reilly explained that he had made that statement in the report because he had not been, and still was not, certain of the specific activity that had caused his injury: ''whether it was pounding, twisting, yanking, any number of things I did.''

Nonetheless, both in the report and when he testified, Reilly described an incident that occurred on April 4, 1985, stating that he felt that it had caused his injury. While making a particular delivery of cement that day, he needed to use a hammer to pound two cement chutes together, so the cement could be poured from the mixer. Afterward, he had to repeat the hammering procedure and, also, had to twist and pull to get the chutes to disengage from each other. Reilly testified that he was reasonably certain that his injury had been caused by something that he had done in the course of attaching and disattaching the chutes while unloading cement at that location that day. He credibly testified that he could think of nothing else that he had done, either on that day or on the following one, that could have caused his injury.

Respondent has adduced no evidence that would support an alternative conclusion: that is, that would show that the injury had been caused by some other activity on April 4 or

5, 1985. In fact, not only is there no evidence that anyone challenged the work relatedness of Reilly's injury at the time of his medical examination, but in his initial report to CNA Insurance on April 10, 1985, Dr. Lehoang specifically characterized Reilly's injury as one ''sustained during the course of his employment.'' In its brief, Respondent points out that, ''Reilly operated the mixer for almost a decade without incident.'' Yet, nowhere is it written that to be characterized as work related, an injury must occur on the first day of employment on a job, or shortly thereafter. There is no evidence showing a correlation between employment length at a particular job and diminished numbers of work-related injuries. Consequently, I conclude that a preponderance of the evidence shows that Reilly sustained a work-related injury on April 4, 1985.

Respondent does not challenge the fact that Reilly was suffering a torn rotator cuff that required surgery in September 1985. However, it does argue that ''that surgery was remote in time from the April incident and the tear may well have been due to other or intervening activity.'' Yet, Respondent has presented no evidence showing any specific ''other or intervening activity'' that could have caused Reilly's torn rotator cuff. The only possible alternative cause even remotely suggested by the record was that Reilly may have torn it while working after June 3, 1985, when he had returned to mixer truck driving so that Dr. Lehoang could determine if he could ''handle his usual and customary chore[s].'' But, if the tear actually occurred during that period, because of the work that he performed, it could not be characterized as unrelated to performance of mixer truck operation.

When he testified, Reilly stated that Dr. Lehoang initially had said that the rotator cuff was torn. Respondent contests that testimony, pointing out that in his letter of April 10, 1985, Dr. Lehoang stated expressly that he diagnosed the injury as ''sprain to the right shoulder, rule out rotator cuff tear.'' However, Dr. Lehoang was not called as a witness by Respondent and, standing alone, the statement does not necessarily demonstrate that he had not made the comment attributed to him by Reilly. Moreover, despite the seeming certainty of the above-quoted diagnosis, it appears to be contradicted by another statement made by Dr. Lehoang in that very letter. Thus, in the ''DISCUSSION'' section of the letter, he explains that although he ''believe[d] that [Reilly] sustained a sprain to the right shoulder with the possibility of a reoccurrent bursitis in his shoulder,'' he continues on to state that, ''because of the weakness of abduction against resistance, the possibility of a tear of the rotator cuff should be borne in mind. *This will then be a new injury on April 4, 1985*.'' (Emphasis added.) In sum, a preponderance of the evidence shows that Reilly's torn rotator cuff had been work related, regardless of whether it actually occurred on April 4, 1985, or whether it occurred because of aggravation while working between June and September 1985, when he had been returned to work so that Dr. Lehoang could ascertain whether Reilly could ''handle his usual and customary chore[s].''

In its brief, Respondent appears to contend that it cannot be said that Reilly's injury would not have occurred even had he been driving a cement train in April 1985. True, Dr. Lehoang's reports do indicate that Reilly may have been disposed to an eventual rotator cuff tear due to a ''weakness of abduction against resistance.'' Yet, Respondent has not shown with particularity that duties involved in driving a cement train likely could have led to a torn rotator cuff. In contrast, the evidence is not disputed that vigorous arm movement occurs in connection with operating cement mixer trucks, especially when pounding and twisting to assemble and disassemble chutes. Similar arm movements are not required of cement train drivers, at lease so far as the record discloses. And, so far as the evidence shows, it had been those very types of activity that led to Reilly's torn rotator cuff. Consequently, there is insufficient evidence to show that he likely would have suffered a rotator cuff tear had he been operating a cement train, instead of a mixer truck, on April 4, 1985.

Neither is Respondent helped by its argument that Reilly should have sought alternative employment with Respondent once he ascertained that his injury prevented him from operating a mixer truck. In the final analysis, this is but a modified version of the rejected argument that wrongfully discharged employees should be compelled to ''come back, hat in hand, and seek favorable consideration as possible employees if the employer [who discharged them should choose to invite them to reapply for work].'' *Hydro-Dredge Accessory Co*., 215 NLRB 138, 139 (1974). It is Respondent who carried the burden of taking the initiative concerning Reilly's reinstatement. As the victim of Respondent's unfair labor practice, he was under no obligation to make overtures to Respondent about possible alternative employment.

Especially is this true in the context of this case. During 1985 and 1986, Respondent was operating cement trains in Vernon and El Monte. Accordingly, there was alternative employment that could have been offered to Reilly had Respondent chosen to do so. Further, by doing so, Respondent could have resolved whatever doubts it now claims to harbor regarding Reilly's willingness to continue working. As the events of 1985 and 1986 demonstrate, Reilly continued to try to report for work. But he was continually assigned to cement mixer driving. Consequently, Respondent cannot disregard its own responsibility, as the party in control of the work, by trying to shift the burden to Reilly with regard to possible alternative employment to cement mixer driving.

As set forth above, Reilly testified that he had intended to retire when he reached the age of 62, on January 10, 1989. As a result, the General Counsel concedes that his backpay period ends on that date. However, also as set forth above, the General Counsel contends that Reilly should receive backpay to that date, because he had been unable to continue driving a cement mixer truck after July 1986. While noting in its brief that, following his injury, Reilly ''abandoned any effort at further employment in any capacity,'' Respondent does not contend that Reilly's backpay should be reduced for lack of effort to diligently seek interim employment after July 1986. Nor did Respondent even attempt to elicit evidence in connection with such a contention. Instead, it asserts that ''Respondent should not bear the burden of backpay for such an extended period, terminable only upon a date that the employee selects as the date he would have retired in any event.''

To support that argument, Respondent contends that Reilly's ''disability has persisted since April 1985, for more than four years.'' However, in making that particular contention, Respondent somewhat overstates the duration of

Reilly's actual period of disability retirement. As set forth above, Reilly returned to—and Respondent accepted him back for—work 2 months after the injury had occurred. Thereafter, he worked, apparently continuously, for almost 4 months before again going on leave for surgery. However, there is no evidence that Respondent regarded Reilly's employment to be terminated because of that absence. So far as the evidence discloses, it freely allowed him to resume working on April 2, 1986, without treating him as a new employee. Moreover, while he apparently was again on leave after that date, due to inability to perform the nondriving duties of a cement mixer truck operator, Respondent did not regard his employment as having terminated. Rather, so far as the record discloses, it continued to regard him as its employee until he chose to retire. Consequently, while the effects of Reilly's injury lasted from April 1985, the injury was not regarded by either Reilly or Respondent as totally disabling, at lease insofar as cement mixer truck driving was concerned, until August 1, 1986.

Of course, that still means that, under the General Counsel's theory, Respondent's backpay liability continued to accrue for 2 years and 5 months following his retirement. Yet, contrary to Respondent's argument, there is no case holding that the Act, or other general principles, precludes a backpay award because a period of that length is too prolonged. In its brief, Respondent points out that the Board has observed that it ''do[es] not know that [it] should be in the business of making open-ended awards for disability in the manner of a court in a civil tort action.'' (Citation omitted.) *Greyhound Taxi Co*., 274 NLRB 459, 459 (1985). However, the Board did not hold in that case that the over 5-year backpay period was an unduly long one. Rather, it concluded that the evidence did not sufficiently support the alleged connection between the disability and the unfair labor practice. Significantly, that conclusion was rejected on appeal and, in doing so, the circuit court voiced no reservation about the length of the backpay period resulting from its reversal of the Board's Supplemental Decision and Order. *Wakefield v. NLRB*, 779 F.2d 1437 (9th Cir. 1986).

Indeed, several years earlier, the Board did not balk at a backpay order requiring ongoing backpay for an injury. *Graves Trucking*, 246 NLRB 344 (1979). In that case, the circuit court did object to the Board's remedy. However, its objection was based less on the duration of the backpay period than on the fact that it was an open-ended one. *Graves Trucking v. NLRB*, 692 F.2d 470, 476–477 (7th Cir. 1982):

> An open-ended award of that type goes about as far as possible in supplanting the loss of earnings portion of a tort recovery. More significantly, we think, it contemplates determination from time to time in compliance hearings of questions of the continued existence of disability and its cause and extent. Such questions may well be difficult and are outside the scope of those usually dealt with by the Board. The open-ended character of the remedy exacerbates all the problems of limited expertise to which the Board has referred in union violence decisions.

However, having said that, the court selected a period of 2 years as its alternative backpay period for the disability. Since that is only a few months short of the period between Reilly's actual and projected retirement, and inasmuch as it does not create a backpay period that is open-ended, there is no problem in this case similar to that which confronted the court in *Graves*.[6]

Of course, that case involved a situation where the injury resulted from the respondent's unfair labor practice, as opposed to occurring during interim employment which, in effect, is the situation here. Yet, that fact does not serve to shorten the backpay period alleged in the specification. A respondent is liable for backpay during a period of absence caused by injury at interim employment, if that injury likely would not have occurred performing the job of which the claimant was deprived unlawfully. See *Colorado Forge Corp*., 285 NLRB 530, 543 (1987). As concluded above, there is no evidence that duties performed in connection with cement train driving likely would have caused Reilly to engage in the type of vigorous arm activities that led to his torn rotator cuff while operating a cement mixer truck. Consequently, Respondent remained responsible for backpay during the period of absence from work caused by that injury.

In view of the foregoing conclusions, Reilly is entitled to backpay for a period ending on January 10, 1989. Moreover, like Hudson, Jaworski, and Borum, he is entitled to have retroactive pension contributions made on his behalf by Respondent. In that connection, Respondent argues that since Reilly has received $674 per month in early retirement benefits since August 1986, those amounts should be added to his interim earnings for the period during which they were received. The General Counsel argues that Reilly will have to reimburse the pension fund for amounts received during months for which Reilly ultimately receives backpay. While an effort was made to provide evidence about that subject, that evidence was ambiguous at best. The current pension fund's manager for the pension department testified ultimately that, ''My feeling is that [Reilly] would have to pay them back . . . but I would likely present this type of a scenario to the Benefits Review Committee . . . because it is an aberrant situation.'' Such a course now becomes ripe for pursuit, because I am ordering that backpay be paid to Reilly through January 10, 1989.

In the interest of making an accurate determination—one that neither unjustly enriches Reilly by allowing him to retain the retirement payment that he has received, as well as duplicating backpay, nor one that deprives him of backpay covering amounts that he must return to the pension fund—I shall follow a procedure similar to the one that I utilized in *Colorado Forge Corp*., supra, 285 NLRB at 544. That is, I shall direct that Respondent make payment of the full amount of net backpay for the period through January 10, 1989. However, until the benefits review committee makes its determination, as to whether or not Reilly must return payments made for months covered by the backpay period, the Regional Director will withhold the amount equal to that which was paid to Reilly as pension benefits through January

[6] Nor is the backpay period shortened by anything found in *Canova Moving & Storage Co*., 261 NLRB 639 (1982), enfd. 708 F.2d 1498 (9th Cir. 1983). In that case, the claimant was found ''to be physically unable to resume employment in his former capacity.'' (261 NLRB at fn. 3.) Here, no evidence was adduced concerning whether Reilly's torn rotator cuff would have prevented him from resuming work as a cement train driver and, as found above, Respondent never offered him the opportunity to try to do so.

10, 1989. That amount will be returned to Respondent if the benefits review committee determines that Reilly need not repay the pension benefits, but will be paid over to Reilly if the committee reaches a contrary conclusion. If there is a dispute concerning this aspect of this case, the money will be placed into escrow and a further supplemental compliance proceeding can be conducted with regard to it.

IV. SEGMENTATION OF THE BACKPAY PERIOD

According to the specification, ''since quarterly records on backpay are not available,'' apparently due to the unusual lapse of time since commission of the unfair labor practices, backpay cannot be calculated by means of the conventional calendar quarter method specified in *F. W. Woolworth Co*., 90 NLRB 289 (1950). No one quarrels with that proposition regarding calendar quarters. As of the close of the hearing, there was no dispute about substituting a calendar year method for determining net backpay.

After the hearing had closed, however, Respondent moved to withdraw from its stipulation concerning the accuracy of net backpay amounts. That motion was based on Respondent's argument that posthearing research disclosed that where unfair labor practices involve repudiation and failure to apply terms of collective-bargaining contracts, the Board does not apply the *Woolworth* method of segmenting the backpay period. Instead, only a single, overall backpay period exists in those situations. Because the underlying unfair labor practices here arose from a partial repudiation of the blue-book contract, Respondent contends that the backpay period should not be segmented, but rather should commence on January 1, 1976, carrying through, without segmentation, until it concludes for each particular claimant.

To support its contention, Respondent cites *Ogle Protection Service*, 183 NLRB 682 (1970). However, that case is not so expansive as Respondent would have it be read. It is true that the Board held that it would be unfair to apply the *Woolworth* formula to cases where there had been a repudiation and failure to honor the terms of a collective-bargaining contract. But, the Board specifically confined application of that holding to situations that did ''not involve cessation of employment status or interim earnings that would in the course of time reduce backpay.'' (183 NLRB at 683.) That limitation of the *Ogle* doctrine has been repeated by the Board in subsequent cases. See, e.g., *Catholic Medical Center of Brooklyn*, 236 NLRB 497 fn. 1 (1978).

In this case, because there was a cessation of employment and interim earnings caused by the unfair labor practices, *Ogle Protection* provides no basis for disregarding application of the *Woolworth* method of calculating backpay, albeit on a calendar year, rather than quarter, basis. Therefore, I deny Respondent's motion, inasmuch as it is based solely on a misapplication of the *Ogle* remedial doctrine, and since the motion advances no other basis for seeking to withdraw from the stipulations.

V. THE MULTIPLIER

The issue that draws the most attention, and one that appears latently to underlie others, is whether gross backpay should be calculated using blue-book or for-hire contract rates. To support its contention that the latter supplies the correct multiplier, Respondent makes essentially a two-pronged argument. First, it points out that the cease-and-desist portion of the Board's Order is confined to the ''current collective-bargaining agreement with . . . Local 420.'' Second, the unfair labor practices were based on a violation of Section 8(a)(5) of the Act and, emphasizes Respondent, therefore were rooted in a refusal to bargain. Thereafter, Respondent secured Local 420's consent to application of for-hire contract terms to Vernon and El Monte cement train operations. Accordingly, concludes this argument, since Respondent later did comply with its statutory bargaining obligation, the Board must respect the bargain that it struck with Local 420 as a result of doing so. However, there is a major problem with consideration of this argument at this stage of this proceeding.

The cease-and-desist provision has no application to the issue presented here. As pointed out in section II, supra, it is confined to a situation where Respondent later sells and transfers cement trains to L-T Transport, Inc. at Redlands, and discontinues cement hauling operations at Vernon and El Monte, after the vehicles first have been returned to those two locations. Regardless of how the phrase ''its current collective-bargaining agreement'' should be interpreted—and relatively considerable argument is directed to that question—it has no more application to the multiplier issue than it does to the restoration issue.

The crucial issue here is whether or not the Board's Order contemplates application of blue-book contract terms to retransferred operations during the backpay period. In this respect, the terms of the Order are neutral. They neither specifically require, nor specifically preclude, application of that contract's terms. Nonetheless, that very issue was encompassed by an argument addressed to the Board and, later, to the circuit court. As a result, it appears to be one that already has been litigated and resolved.

By the time the Board's Supplemental Decision and Order issued, Respondent already had retransferred the cement trains back to Vernon and El Monte.[7] That occurred after Respondent had secured Local 420's consent, in October 1977, to apply for-hire contract terms to cement trains operated from those two locations. And it occurred even though during the previous month, Respondent had executed a successor blue-book contract with Local 420. However, as noted

[7] The record in this regard is somewhat muddied by injection of the city of Irwindale into the pleadings. In its answer to the specification, Respondent alleged that it had ''transferred the cement trains back into . . . Local 420's geographic jurisdiction (at Irwindale, California).'' Of course the Board directed retransfer back to Local 420's geographic jurisdiction, but at Vernon and El Monte. Thus, facially, a transfer to Irwindale, even if in Local 420's geographic jurisdiction, would not satisfy the retransfer portion of the Order.

However, in his brief, the General Counsel, in effect, conceded that the retransfer had been made to the proper locations: ''The cement trains were still operating out of Respondent's Vernon and El Monte locations . . . on February 28, 1986.'' Moreover, while questioning claimant Reilly, Charging Party's counsel referred to ''the Irwindale/El Monte location[.]'' In fact, in describing his own operation of a cement train prior to 1976, Reilly first testified that, ''The cement train was based at the Irwindale plant,'' and later testified that he had been ''based at the Vernon plant.'' Consequently, in the context of Respondent's operations, references to Irwindale appear to be no more than an interchangeable reference to the El Monte location.

supra, Respondent did not offer reinstatement to any of the 12 claimants, but instead transferred the Redlands cement train drivers along with their vehicles to Vernon and El Monte. Thereafter, Respondent and Local 420 negotiated and executed successive blue-book contracts on June 1, 1979; June 1, 1982; March 26, 1984; and, March 30, 1987, with the latter being effective through April 1, 1990. Local 420 also negotiated and executed successive for-hire contracts with Respondent on March 1, 1980; July 1, 1982; and, July 1, 1985, with the latter being effective through June 30, 1988, by which time Respondent had ceased cement hauling operations altogether, as described in section II, supra. Despite the continued existence of blue-book contracts, Local 420 agreed that for-hire contract terms could be applied to Vernon- and El Monte-based cement train drivers.

Based on those events, after issuance of the Supplemental Decision and Order, Respondent filed with the Board a motion for reconsideration and/or reopening of the record. In that motion, and its accompanying declaration, Respondent advised the Board that for 9 years it had been a party to for-hire contracts with Local 420 and that requiring resumption of operations under blue-book contracts would,

> apparently require Respondent to breach existing—and longstanding—agreements with Teamsters Local 420. Since it is supposedly the bargaining duty owing to Teamsters Local 420 that Respondent has breached, the remedy must take into account the subsequent bargaining that has occurred. Any other remedy would be punitive and disruptive of established conditions.

The General Counsel's opposition to that motion dispels any doubt that the Board was on notice of, and considered, the issue of nullifying application of for-hire contracts, replacing their terms with blue-book ones, during the period prior to retransfer of operations and reinstatement of the claimants—in other words, until Respondent had satisfied all terms of the affirmative portion of the Order. For, in that opposition, the General Counsel stated explicitly that abrogation of for-hire contracts was required, and warranted, by the remedial order:

> Therefore, by abrogating Respondent's For Hire Agreement with Local 420, it would not as Respondent claims be breaching its agreement with [Local 420] but rather reestablishing the ''status quo ante'' which existed prior to Respondent's unlawful conduct and which might have still existed but for their conduct.

Through its deputy executive secretary, the Board denied the motion on September 2, 1986, because, in part, ''it contains nothing not previously considered by the Board.''

Respondent renewed that same contention on review to the Ninth Circuit. Its brief makes the identical, above-quoted, argument. In opposing it, the Board urged specifically in its brief that, ''none of the cases cited [by Respondent] involved a situation in which the employer abrogated a binding contract in midterm and thereafter succeeded in negotiating an agreement on behalf of other employees,'' and, further, that there was no merit to the contention ''that Local 420's acceptance of the for-hire agreement constitutes a 'waiver' of restoration as a remedy.'' The court left undisturbed the retransfer and reinstatement order, including the appropriate collective-bargaining contract contemplated by it.

In sum, from the arguments made in connection with Respondent's postsupplemental decision and in the briefs to the circuit court,[8] it is clear that Respondent understood that the Board's Order required replacement of for-hire with blue-book contract terms with respect to the backpay portion of the Order. In fact, a contrary conclusion would not be logical in the circumstances of this case. Although Local 420 had been agreeable initially in 1975 to that substitution, when the cement train drivers objected, so too did Local 420. After the unlawful relocation, and while the cement trains still were being operated from Redlands, Local 420 did agree that for-hire contract terms could be applied to cement trains operated from Vernon and El Monte. However, the only evidence adduced concerning the circumstances in which that agreement had been reached was the testimony of Oliver Traweek, Local 420's secretary-treasurer. He testified that he had made that agreement in 1976, ''Because they weren't using any cement trains at that time under the blue book in our jurisdiction.'' That explanation is a logical one. It was not contradicted by any other evidence. Accordingly, it had been the effects of its unfair labor practices that had allowed Respondent to obtain Local 420's agreement to the substitution of contract.

Respondent points to the uncontradicted fact that Local 420 never demanded reinclusion of Vernon and El Monte cement train drivers under the blue-book contract following the retransfer. Rather, Local 420 continued to execute successive for-hire contracts on behalf of those drivers. Yet, along with the cement trains, Respondent moved the Redlands drivers to Vernon and El Monte in 1977. None of the claimants, who had driven those vehicles prior to 1976, were offered reinstatement to drive them, even though many of them were working for Respondent in other capacities. Of course, the Redlands drivers had been willing, so far as the evidence discloses, to drive cement trains from Vernon and El Monte under for-hire contract terms. After all, they had been doing so during the immediately preceding period, when the cement trains were stationed at Redlands. In contrast, Respondent, who bears the burden of mitigating backpay, has failed to show that, had they been reinstated, claimants would have felt differently about driving under for-hire contracts than they had prior to the relocation. Certainly, nothing in the record suggests a reason, other than the possibility of repeated unfair labor practices, that logically would have led any of them to change his/her opposition to discontinuing coverage under the blue-book contract.

Nor is there any basis for concluding that Local 420 would have ceased to support the claimants in that regard. To the contrary, Traweek testified that he would not have agreed in 1977 to application of the for-hire contract to Vernon and El Monte cement train drivers had the 12 claimants still been employed at those locations. No other evidence has been produced that would provide a basis for inferring that Local 420 later would have abandoned the claimants' desires and suddenly agreed that they had to work from Vernon and El

[8] Reliance on briefs to ascertain an administrative agency's position is neither improper nor unprecedented. See discussion *Service Employees Local 535 (North Bay Center)*, 287 NLRB 1223 at 1226 fn. 7 (1988).

Monte under for-hire contracts. Of perhaps equal significance, there is no evidence showing that Respondent would have insisted to the point of impasse on such a change during negotiations that occurred after 1976.

In sum, in the circumstances, it appears that the Board's Order contemplates application of blue-book contract terms to reinstated cement train drivers. It follows that blue-book rates should be utilized as the multiplier for backpay owed to claimants until that reinstatement obligation is satisfied. That conclusion is supported by the history of the litigation in this proceeding, as well as by the absence of evidence that would support a conclusion that, had the claimants been reinstated, there would have been agreement to substitute for-hire contracts for blue-book contracts.

For 9 of the 10 claimants still involved in this proceeding that conclusion, in conjunction with the ones reached in previous sections, resolves all further dispute concerning their net backpay, since the parties have stipulated to the accuracy of the computations in the appendices to the specification. It also resolves the accuracy of the hourly rate to be utilized for calculating retirement fund contributions and the amounts of contributions to be made on behalf of Hudson, Jaworski, and Reilly.

VI. NET BACKPAY FOR KRIS BORUM

Left for consideration are the particularized contentions pertaining to Kris Borum's backpay. Two of them are based on events during 1976. First, as noted in section III, supra, Respondent contends that Borum's backpay should toll from the date her shoulder was injured by the falling chute until June 14, 1976. Second, Respondent contends that her conceded interim earnings of $1572 for that year have been understated. The evidence, however, does not support either of these arguments.

Borum had been laid off by Respondent on December 31, 1975, and was recalled as a cement mixer driver by letter dated May 13, 1976. Respondent did not contend that she earned any income during that 4-1/2-month period and there is no evidence showing that she did so. From May until June 4, 1976, when she was injured, she worked steadily as a mixer driver. So far as the evidence shows, her earnings for that work have been taken into account in the specification. At least, Respondent has not shown, nor argued, to the contrary. From June 4 through July 31, 1976, she was off work due to her shoulder injury, as discussed in section III, supra. While she earned $276.18 for driving the single haul for Fox Hollow at some point, Respondent has not argued that that amount has not been taken into account in determining her interim earnings. On August 1, 1976, she purchased her tractor and commenced self-employment as an owner-operator.

The contention that Borum's backpay should toll from the date of her injury until July 14 is apparently based on the lack of a doctor's excuse for that period. However, as set forth in section III, supra, a preponderance of the evidence shows that her injury was work related. Further, she was treated initially by medical personnel selected by Respondent. More importantly, there is no evidence either that Respondent had requested a doctor's statement for the pre-July 14 period or, given her injury, that Borum could not have supplied one, had it been requested. Indeed, there is an inherent inconsistency between tolling backpay for the period immediately following a work-related accident, but then not doing so for a later period of absence caused by that same accident. Accordingly, the record will not support the conclusion that Borum's backpay should toll from June 4 until July 14, 1976.

The principal dispute pertaining to Borum's 1976 backpay, as well as for the succeeding 2 years, centers on her earnings while self-employed. She filed no income tax returns for 1976 through 1979 and her records for that period of self-employment were lost when her truck had been repossessed. Borum was unable to recall what loads she had hauled in 1976 while self-employed. She acknowledged that she ''could'' have earned more than $1572 during 1976. But she also testified that her reference to ''earnings'' meant the gross revenues she derived from self-employment as an owner-operator and that 90 percent of those earnings were allocated to her expenses of operating. ''Only the net profits from self-employment ought to be included in interim earnings.'' *California Dental Care*, 281 NLRB 578, 582 (1986). See also *Boilermakers Local 27 (Daniel Construction)*, 271 NLRB 1038, 1041 (1984). Consequently, even if Borum ''could'' have earned more from self-employment during 1976, that would not establish that her interim earnings for that year were so great that more than $1572 should be deducted from gross backpay.

Aside from the fact that only net income from self-employment is allocated to interim earnings, there are several personal aspects of Borum's situation that must be considered in connection with her ability to support herself and two children on seemingly low interim earnings. When Respondent laid her off, she had approximately $10,000 in a savings account and owned 3 houses and 17 horses. Ultimately, to support herself and her two children, she exhausted her savings and sold her houses and horses, one by one. She also used her jewelry to pay someone to care for her children during a period when she was on the road making a haul. In addition, she borrowed $1800 from her mother, close to $3000 from her father, and another $1800 to $2000 from a finance company. Eventually, she and her children were reduced to having to live in the tractor before it was repossessed. As a result of these events, it is not implausible that Borum and her children could have survived during 1976 through 1979 on interim earnings that were so low.

According to the specification, she had no interim earnings for 1977. Whatever income she received during that year was derived from her self-employment. Even before she testified about the existence of the case of records in her father's garage, Borum freely acknowledged having earned more than $1572 in 1977, although she was unable to estimate how much more. Nor was she able to estimate the number of loads she had hauled during that year. The records from the case confirmed he acknowledgement of earnings in excess of $1572. Check stubs showed that she had received a total of $3130 from Calavo Growers for hauls.

However, from the revenues that she earned, Borum had to pay the expenses of operating her tractor, as well as a refrigerated trailer which she purchased at some point.[9] Thus, she had to pay principal and interest for the equipment and she had to pay for fuel, maintenance, repairs, and several different types of insurance. In short, there is no evidence that

[9] Actually, she had to purchase a second one, after the first one had been stolen on December 1, 1977.

the revenues received by her from self-employment during 1977 had exceeded her costs of operation. Moreover, it was during this particular year that she had begun selling houses to pay personal expenses. It also was during 1977 that she used her jewelry for child care payments. In the circumstances, there is no objective basis for challenging the specification's computation of zero interim earnings for 1977.

The events of 1978 cannot be considered without some regard for what occurred during the first 2 months of the following year. As mentioned in section III, supra, in February 1979 Borum's tractor was repossessed from a location where it had been undergoing repairs since December 1978. In connection with her subsequently suit for wrongful repossession and conversion, she claimed that she lost net monthly income of $4800.[10] That estimate was based on Borum's self-employment earnings prior to the tractor's breakdown in December 1978. However, the specification's appendix for her, as amended after close of the hearing, recites only $9600 as the amount of Borum's interim earnings for 1978. Respondent contends that this amount is understated.

Borum testified that the amount stated as monthly net earnings in her lawsuit had been based on what she would have earned under a steady hauling arrangement with Holly Farms. However, she testified that the arrangement had not existed until around October 1, 1978. Prior to then, she testified, she never had received even approximately the monthly amount of money from self-employment that she would be receiving from Holly Farms. In fact, the only specific evidence of any other revenue received by her during 1978 was $560 earned in May for hauling a single load for Produce West—representing the amount that remained from the gross amount of $2400 after deduction of advances to cover operating expenses and a late charge.

Of course, steady hauling for Holly Farms during the final 3 months of 1978 would have generated more net income than the $9600 interim earnings acknowledged by the General Counsel for that year. But, in fact, due to tractor breakdowns, Borum hauled steadily only during the month of October. Because the tractor was being repaired, she hauled only for approximately 3 weeks and 1 or 2 days in November and, due to another breakdown, for only about 1-1/2 weeks in December. Thus, apparently the General Counsel calculated her interim earnings for 1978 by adding the November and December weeks of actual operation together, treating them as a single month, and, then, adding that constructive month to the month of October to derive an overall interim earnings figure of $9600.

Respondent might well argue that another week should be added to Borum's interim earnings in the final quarter of 1978, to account for the 1 or 2 extra days work in November and the one-half week extra hauling in December. It might also be argued that the General Counsel failed to include in interim earnings the $560 received from Produce West earlier that same year. Yet, in the context of this case, those arguments fail. For, as discussed in section IV, supra, the parties agreed that backpay periods need not be segmented into calendar quarters. Rather, they are segmented into calendar years. Consequently, in calculating Borum's interim earnings for 1978, the entire year must be taken into account. As a result, all self-employment expenses for 1978 must be deducted from all her income for that year to derive her interim earnings for 1978. There is no showing that the General Counsel did not do so. Viewed from that perspective, the record does not establish that Borum's net income from self-employment during 1978 exceeded $9600.

As was true of 1978 and 1979, there is a degree of overlap from 1979 into 1980. A few days after repossession of her trailer in February 1979, Borum suffered a nervous breakdown that rendered her unavailable for employment. Moreover, she testified generally that, following her breakdown, she had been unable to stay at any job and that this problem had not truly been corrected until she began working for North Line Bus. Her employment there commenced during the final calendar year 1980. Respondent contends that her backpay period should toll from February 1979 to October 1980, to reflect her admitted period of unemployability. The Charging Party contends the backpay period should toll for only a few months after her breakdown, although no specific period is suggested. However, the General Counsel has amended the appendix for Borum ''to reflect the 8 months [she] did not actively seek employment [in 1978].''

Despite Borum's general estimate of her period of incapacity, the evidence shows that she did seek and obtain employment during 1979. In fact, she identified four specific employees for whom she had worked during that year: Mission Petroleum, Custom Ready-Mix, Holiday Inn Airport, and Blue Marlin Restaurant. Further, there is no evidence that she either quit or had been fired by any of those employers. To the contrary, in interrogatories filed on June 4, 1980, in connection with her lawsuit stemming from repossession of her tractor, Borum answered that she then was employed by Blue Marlin Restaurant and had been working there for 9 months. Moreover, the General Counsel acknowledges that Borum received $4144 as interim earnings during 1979. Since she did not earn any revenue from self-employment, because her tractor had been undergoing repairs from the beginning of the year until it was repossessed, those earnings could only have been received during the latter part of 1979, after she again had begun seeking employment following convalescence from her breakdown. Therefore, despite her generalized testimonial estimate about the duration of the effects of her nervous breakdown on her availability for interim employment, a preponderance of the specific evidence shows that she did seek employment during latter 1979 and had been gainfully employed during that period. There is no basis in the record for extending the tolling of her backpay period beyond the 8-month period that the General Counsel conceded it should be tolled.

For 1980, the specification recites that Borum's interim earnings were $1889. While, as set forth above, she had worked for Blue Marlin Restaurant for the entire first part of the year until, at least, June, she testified that she had been paid only tips for that work. Thus, it is perhaps not surprising that her earnings for that period would not have been lavish. According to social security records, she earned $1,115.10 working as a cleaning lady for North Line Bus during the last calendar quarter of that year. In addition, she testified that during that year, possibly between working at

[10] Ultimately, a settlement was achieved in that case. However, there is no contention, and no evidence to support one had it been made, that any portion of the amount received by Borum had been allocated specifically to lost earnings.

Blue Marlin and for North Line, she had worked again briefly for Holiday Inn Airport and, also, for Grain Transport, driving a bottom dump to haul grain from rice fields, for approximately 2 weeks to 1 month. Given the amount of her North Line Bus earnings, it would seem that she could have earned more at interim employment than the General Counsel concedes. Yet, she did file an income tax return for 1980 and her social security records for her work at Grain Transport were referred to when she was questioned during the hearing. Respondent did not claim lack of access to either of these records. However, it adduced no evidence of interim earnings for 1980 greater than the amount recited by the specification. Therefore, there is no basis in the record for concluding that Borum's interim earnings exceeded $1889 during calendar year 1980.

Borum continued working for North Line Bus until June 1981, when she began working as a bus driver for Kerrville Bus Company in Texas. She worked for the latter for the remainder of the backpay period covered by the specification. No dispute occurred concerning her interim earnings figure for 1981, nor did one arise concerning her interim earnings figures recited in the appendix for 1982 through 1984.[11]

During 1985, Borum continued driving a bus for Kerrville until September 3, when two vertebrae were broken in her neck, requiring fusion surgery. She was unable to work from that date until late April 1988, when she resumed working as a driver for Kerrville. It is uncontroverted that her only income during that approximately 2-1/2 year period had been derived from workmen's compensation. The General Counsel has deducted that amount as interim earnings for 1985 through April 1988, as required when such payments are a substitute for lost wages. See *Canova Moving & Storage Co*., 261 NLRB 639, 640 (1982), enfd. 708 F.2d 1498 (9th Cir. 1983).

Respondent, however, argues that Borum's backpay period should toll altogether for that entire period, arguing that it has not been shown that her injury had been caused by a particular factor that made bus driving more difficult than cement train driving and, further, that the General Counsel has failed ''to show that any interim employment is 'so unusual or so dissimilar' that an injury would not have occurred but for the Respondent's violation of the Act,'' citing *City Disposal Systems*, 290 NLRB 413 fn. 2 (1988). However, that argument misconstrues what is required in this type of situation. The question is not whether the interim employment, per se, is more difficult than the job of which the claimant was deprived unlawfully. Rather, the issue is whether the injury would ''[likely have occurred] if working for respondent.'' *Central Freight Lines*, 266 NLRB 182 at 184 fn. 13 (1983). See also *Colorado Forge Corp*., supra, 285 NLRB at 27–28.

Borum testified that she had been injured by pulling on a handle in an effort to open the manually operated bus door. Moreover, she testified that nothing involved in driving a cement train would have required her to engage in that type of activity and to sustain that type of injury. No evidence was presented to refute that testimony. Therefore, I conclude that the backpay period of Borum should not be tolled during the period that she was incapacitated by the injury caused by trying to pull open the bus door.

No dispute is raised concerning the amounts of interim earnings recited by the General Counsel for the remainder of 1988 and for January 1989. Respondent does contend that the record shows that Borum suffered an injury on March 13, 1989, and argues that ''this injury should toll further accrual of backpay.'' However, this event occurred outside the, in effect, agreed-on cutoff date for the overall backpay period. Consequently, I make no finding concerning its effects, if any, on Borum's right to further backpay.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[12]

ORDER

It is ordered that the Respondent, Brown Company; Brown Company, Livingston-Graham Division; Brown Company, Tri-City Concrete Division; L-T Transport, Inc. and successors with liability Gulf & Western Industries, Inc., Livingston-Graham Inc. Division; Symons Corporation, Livingston-Graham Inc. Division; Riverside Cement Company, Livingston-Graham Inc., Division, Vernon and El Monte, California, its officers, agents, successors, and assigns, shall

1. Pay $43,390 to Louis Bering, $252,236 to Kris Borum, $36,016 to William Cannon, $2493 to Anthony Giangrece, $9916 to Clarence Hudson, $20,450 to James Jaworski, $96,136 to Harry Potts, $166,027 to Robert Reilly, $51,941 to Carmen Rosselli, and $100,566 to James Wilson, with interest accrued to the date of payment in accordance with standard Board formula as required by the Board in its Supplemental Decision and Order issued February 28, 1986, and with backpay obligations to all claimants reserved for future determination for all periods after January 31, 1989. The Regional Director for Region 21 shall withhold from payment to Robert Reilly, and hold in an escrow account if necessary, an amount equal to total retirement benefits paid monthly to him from August 1986 through January 1989. That amount shall be paid to Reilly if it is determined that he must repay the pension benefits that he received during that period, but shall be returned to Respondent if it is determined that Reilly does not have to repay those benefits.

2. Pay to Western Conference of Teamsters Pension Trust retroactive contributions in the amounts of $52,275 on behalf of Kris Borum, $541 on behalf of Clarence Hudson, $562 on behalf of James Jaworski, and $21,078 on behalf of Robert Reilly, with interest accrued to the date of payment, if appropriate, in accordance with standard Board formula as required by the Board in its Supplemental Decision and Order issued February 28, 1986, and with contributions on behalf of claimants reserved for future determination for all periods after January 31, 1989.

[11] Borum was absent from work for 3 weeks during 1983 due to outpatient surgery for carpel tunnel syndrome of both hands. Her appendix to the specification deducts 3 weeks' regular and overtime hours from her gross backpay for that period of unavailability for employment.

[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

IT IS FURTHER ORDERED that the backpay specification be, and it hereby is, dismissed insofar as it seeks restoration of cement train operations by Respondent and insofar as it alleges an obligation to reimburse Kris Borum for basic hospital and medical coverage, vision care, and prescription drugs for the years 1986 through 1988.